October Term, 1970

No. 464

GAINESVILLE UTILITIES DEPARTMENT, CITY OF GAINESVILLE, FLORIDA, *Petitioner*,

v.

FLORIDA POWER CORPORATION, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

# MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE AMERICAN PUBLIC POWER ASSOCIATION

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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The American Public Power Association respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae* in support of the petition for certiorari of Gainesville Utilities Department and the City of Gainesville, Florida. The at-

torneys for the petitioners have consented to the filing of this brief but the attorneys for the respondent, Florida Power Corporation, have refused.

The applicant, American Public Power Association, a national service organization, has an interest in this case in that it represents more than 1,400 local, publicly owned electric utilities in 48 states, Puerto Rico, the Virgin Islands and Guam, including the petitioners, Gainesville Utilities Department and the City of Gainesville, Florida. Many of these publicly owned utilities are directly and seriously affected by the decision in the court below.

The basic issue presented in Gainesville's petition for certiorari is the terms and conditions which are to prevail for interconnection of facilities between a large and small electric utility pursuant to Section 202(b) of the Federal Power Act (16 U.S.C. 824a(b)). The court below adopted a rule of payment between the interconnecting systems which is based upon the benefits which accrue to each and set aside the Commission's determination that payments should be set according to the responsibilities borne by each system and the costs associated therewith. *Florida Power Corporation* v. *Federal Power Commission,* Op. No. 27404, (5th Cir., May 1, 1970).

The decision of the court below presents an important question of federal law which has not been, but should be, settled by this Court. If allowed to stand, without review, the decision will leave in a state of confusion interconnection negotiations underway in many parts of the country at the present time. Furthermore, the decision will seriously impair the prospects for interconnection and coordination between

many large and small electric utilities in the future. These are needed to improve service reliability and prevent blackouts, voltage reductions and other disruptions.

Workable interconnections and coordination agreements are an absolute necessity for the survival of many dispersed, publicly owned utility systems which meet an important portion of the nation's electric energy needs. Many of these systems are members of A.P.P.A. The Association therefore respectfully requests this Court to grant it permission to file its annexed brief *amicus curiae* in support of Gainesville's petition for writ of certiorari.

Respectfully submitted,

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## BRIEF OF THE AMERICAN PUBLIC POWER ASSOCIATION AS AMICUS CURIAE

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By leave of this Court, the American Public Power Association files this brief as *amicus curiae,* prior to consideration of the petition for writ of certiorari of petitioners Gainesville Utilities Department and the City of Gainesville, Florida.

## INTEREST OF AMICUS CURIAE

The *amicus curiae,* American Public Power Association, a national service organization, has an interest in this case in that it represents more than 1,400 local, publicly owned electric utilities in 48 states, Puerto Rico, the Virgin Islands and Guam, including the petitioners, Gainesville Utilities Department and the City of Gainesville, Florida.

Many of these publicly owned utilities are isolated systems which desire to interconnect their facilities with those of large, investor-owned electric utilities to improve the quality of service offered to their customers. Others are seeking to enlarge and improve existing interconnections. These publicly owned electric utilities will be directly affected by the Court's decision whether or not to review the decision of the court below, which deals with the terms and conditions for ordering interconnection of electric utility systems.

## ARGUMENT

The court below has decided an important question of federal law which has not been, but should be, settled by this Court. The *amicus curiae* adopts in substance the brief of petitioners. The *amicus curiae* does not propose to argue the merits of the case but to identify the issues of nation-wide importance of this case and their impact on all utility systems which demonstrate the need for this Court to grant Gainesville's petition for certiorari.

The basic issue presented in Gainesville's petition for certiorari is the terms and conditions which are to prevail for interconnection of facilities between a large and small electric utility pursuant to Section 202(b)

of the Federal Power Act (16 U.S.C. 824a(b)). The court below adopted a rule of payment between the interconnecting systems which is based upon the benefits which accrue to each and set aside the Commission's determination that payment should be set according to the responsibilities borne by each system and the costs associated therewith. *Florida Power Corporation* v. *Federal Power Commission,* Op. No. 27404, (5th Cir., May 1, 1970).

The decision rendered below seriously limits the Federal Power Commission's discretion to determine, based upon its expertise, the terms and conditions of interconnection between electric utilities, a responsibility which is specifically vested in the Commission by Section 202(b) of the Federal Power Act.[1]

The decision establishes a rule that any interconnection between large and small electric utility systems benefits only the smaller system. More importantly, it holds that the smaller system, in addition to bearing its share of the cost of interconnection, must also pay the larger system for the benefits which only the smaller system is deemed to gain by interconnection (an annual stand-by demand charge in the instant case).

We submit that such a novel rule, reversing the Commission's determination, is wholly inappropriate and is such an important question of federal law that it must be settled by this Court. The benefits of interconnection accrue to both large and small utilities, as specifically found by the Commission in this case (*Gainesville Utilities Dept., et al.* v. *Florida Power Corp.,* Docket No. E-7257,

[1] This point is developed in more detail in Part IV of this brief.

FPC Opinion No. 550, Nov. 5, 1968, *rehearing denied*, FPC Opinion No. 550-A, Jan. 2, 1969; see Appendix B to the Gainesville petition for certiorari). If such a rule is not reviewed by this Court but is allowed to stand in its present form, many areas served by small, publicly owned electric utility systems will be deprived of reliable electric energy, and customers of large, investor-owned electric utilities will be forced to forego the benefits which flow from strong, interconnected electric energy systems. Furthermore, the decision reached by the FPC in the Gainesville matter has provided important guidelines for interconnection which are being followed in many parts of the country. The court's decision below throws many of these plans into a state of confusion which can only be clarified by granting petitioner's petition for writ of certiorari.

## I

### GENERAL IMPACT OF THE DECISION BELOW ON ISOLATED UTILITY SYSTEMS

There are over 2,000 local, publicly owned electric utility systems in the United States, which together supplied electricity to 9,100,000 customers in 1967. These customers constituted 13 percent of the nation's total consumers of electricity. With a total installed generating capacity of over 29,000,000 kw in 1967, the publicly owned systems accounted for 14 percent of the total sales of kilowatt-hours of electric energy.

These small, publicly owned utilities are constantly attempting to improve the quality and economy of service they render through interconnection and coordinated operating arrangements with larger systems. The principle of strong interconnections and coordinated

operations among utility systems was endorsed in the Federal Power Commission's *National Power Survey,* 1964. After the *National Power Survey* came the Northeast power blackout. The Commission studied the problem and concluded in its report, *Prevention of Power Failures,* 1967, that stronger interconnected operations were necessary to prevent future blackouts and noted that problems still remained in determining the method of allocating the costs of interconnections. Furthermore, the Court of Appeals for the Fifth Circuit has recently stated that, "Interconnection has become a fact of life to meet needs, scheduled and emergency, of localized areas and large regions." *Florida Power and Light Co.* v. *F.P.C.,* Op. No. 24956, at p. 5 (5th Cir., July 13, 1970).

This goal of strong, reliable, interconnected power systems would be seriously hampered, if not rendered unattainable, if the decision of the court below were allowed to stand without review by this Court. Interconnection depends substantially on recognizing that both parties to an interconnection will contribute benefits to the customers of each other. Interconnection is not a one-way street requiring a small utility to pay sums to the large utility beyond its allocated share of the costs of interconnection.

For example, in the present case the Commission found that:

1. Both parties will benefit financially from coordinated planning and more intensive utilization of existing generating resources;

2. Florida Power will acquire an additional energy source only 15 miles from its Archer substation which serves substantial loads in the Gainesville

area, whereas its closest generating facility now is 75 transmission miles away and;

3. Florida Power's system reliability will be improved.

The court below, however, summarily dismissed these benefits, substantiated by staff studies of the Federal Power Commission, as "illusory."

The effect of the decision of the court below is to disregard one of the most important benefits that a small utility can offer a larger one, namely, that customers of the large utility, located near the small utility, can expect greater reliability of service through interconnection. Examples of specific instances where small utilities have benefitted larger utilities when interconnected are provided for the Court's information later in this brief.

Aside from the merits of the particular case at hand, the effect of the decision of the court below is to cast grave uncertainty on the guidelines established by the FPC in the Gainesville case. The Commission in its decision established a policy of interconnection based upon the cost burdens borne by each of the parties, and this policy is being used as a guideline throughout the country in planning and negotiations for interconnection arrangements. It is a practical policy and one that administrative agencies can effectively apply. To reopen the question now, which is the effect of the decision rendered below, will hamper the badly needed expansion of interconnected and coordinated operations in the electric utility industry required to minimize power shortages and blackouts.

## II

### INTERCONNECTION AND COORDINATION ARRANGEMENTS ARE CURRENTLY UNDER WAY WHICH WILL BE SUBSTANTIALLY AFFECTED BY THE DECISION RENDERED BELOW

The FPC's order issued in the instant case has had a strong impact upon the planning of local, publicly owned electric systems in considering their long range needs for power supply.

For many years, large numbers of the publicly owned systems have either bought all of their power at wholesale from large power companies, generated their power in electric isolation from nearby power companies because they were unable to obtain reasonable interconnection contracts, or operated interconnected with companies on terms generally less favorable than the companies had established in their interconnection arrangements with other investor-owned systems.

The Commission's determination in the Gainesville matter was of significance because the FPC staff made a detailed analysis of the way in which the benefits would flow from interconnected service. They showed that proportionate areas of both Florida Power's and Gainesville's systems would benefit approximately equally even though the interconnection involved a relatively small system and a very large system.

Although each interconnection must be evaluated on its own merits, the procedure used by the FPC staff in Gainesville-Florida Power could be applied to many other potential interconnections. It has also provided a basis for examining methods by which groups of municipally owned systems could interconnect with other larger systems and operate in parallel to better serve all customers in a particular area.

In North Carolina, the Electric Power in Carolina program (EPIC) has been proposed by the municipal electric systems and the electric cooperatives in the State.[2] This planning project would involve large-scale generation and transmission throughout the State of North Carolina providing for the total future loads of the municipal and rural electric cooperative systems in the State. Maximum economic gains and minimum duplication of existing facilities can only be accomplished if the planned projects can be closely coordinated with the large investor-owned systems in the area. The Gainesville-Florida Power decision of the FPC prior to the decision of the court below, favorably influenced planning of the EPIC group, since it assured the municipal and cooperative systems that coordinated operation could be effectuated without penalizing smaller systems. The decision of the court below has substituted grave uncertainties for this assurance.

A group of cities in Northern California (Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara, Ukiah) is now planning future power supply.[3] These cities are either served at wholesale by the Pacific Gas and Electric Company or by the U.S. Bureau of Reclamation. They will soon require power in addition to that which they have been able to obtain from the Bureau of Reclamation. They are unwilling to remain in any position where they will only be power purchasers. By joint financing they could construct large-scale power plants and operate them in coordination with the Bureau of Reclamation, Pacific Gas and Electric Com-

[2] *Public Power*, American Public Power Association, December, 1969, p. 12.

[3] *Ibid.*, June, 1969, p. 13.

pany and other large systems in the region. To do this successfully will require close coordination with all the major power systems, and this coordination, in turn, will depend on the formula for calculating interconnection costs and benefits—that of the FPC or the diametrically opposite one of the court below.

Efforts are now under way to establish a regional power pool in New England, an area characterized by high electric rates and small generating stations.[4] The question involved in the petition for writ of certiorari is central to resolution of the compensation arrangements, the principles of which have been preliminarily accepted by all New England electric utilities. These agreed upon arrangements follow the principles of the Commission's Gainesville decision. The New England Power Pool ("NEPOOL") solution can become a pattern for the formulation of power pools in other parts of the country. If petition for writ of certiorari is not granted, this possibility will be jeopardized, or at least delayed for many years while the Commission restudies the Gainesville case on remand.

The impact of the Gainesville decision is clear when the 1968 draft of the regional New England Power Pool is compared with the 1970 Agreement. The 1968 draft was submitted to the FPC before its decision in Gainesville and the 1970 Agreement after the FPC decision.[5] The "Before" draft would require small

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[4] *Ibid.*, February, 1970, p. 20.

[5] (i) "Before" Draft: Form of Power Pool Agreement as Proposed by NEPOOL Committee; December 20, 1968.

(ii) "After" agreement: Interim NEPEX Power Exchange Agreement and Letter of Intent New England Power Pool: June 1, 1970, filed with FPC as a rate schedule May 21, 1970.

utilities systems to pay one-half of their estimated benefits from interconnected pool operations over to the large utilities, and this was rejected by many small utilities. The "After" agreement requires a pro-rata fair sharing of the cost burdens of pool operation and transmission, and has been accepted by all significant utilities, as a policy matter, subject to finalizing unresolved issues and details in an acceptable package.

The "Before" draft was dated December 20, 1968, and did not reflect the principles of FPC's Gainesville decision. This draft (Section 11.1) specifically required a smaller utility to pay sums to larger utilities because it would "realize benefits . . . while . . . avoiding costs . . . which such Participant would be forced to incur under any arrangement which it might enter into as an alternate to participation in NEPOOL." These "benefits" would be measured "on the basis of a comparison of the situation" as between operating in NEPOOL and outside NEPOOL.

This benefits theory of the "Before" draft was flatly rejected by most of the 80 municipal and cooperative utilities in New England. A year of negotiations ensued among the parties, with participation of the staff of the Federal Power Commission, and these produced the "After" agreement. The central compensation charge is that every utility in the pool will pay a pro-rata share of the total cost of the interconnected regional transmission grid necessary to connect all significant generation facilities, and these payments will be received by the systems owning the transmission facilities. In exchange, all systems will have the right to use the regional transmission system for purchases, sales, and joint generat-

ing projects. In addition, all power supply utilities will provide equalized capacity reserves (*i.e.*, they will keep as reserve an approximately equal percentage of capacity in excess of loads). The reversal of the Commission's decision by the court below, in the Gainesville case, will seriously hamper the application of these principles, established in the NEPOOL Agreement, from being used elsewhere.

The problems discussed above were anticipated by the Commission in considering Florida Power's requested stand-by charge in the instant case:

> ". . . [It] would discourage future coordinated planning and operation by reducing the economic incentive for Gainesville to install larger and more efficient generating units. Without such a demand charge, Gainesville could participate more fully in coordinated planning including staggered construction with Florida Power and other systems in Florida to the mutual benefit of all such systems." (p. 13)

Unless a smaller utility seeking interconnection is recognized as at least being capable of contributing benefits to the larger system through interconnection, its incentive to interconnect with private utilities will be seriously diminished. Instead, the smaller systems will need to look to establishing their own separate, duplicative transmission systems, whenever possible, in order to obtain the benefits of interconnection. Where this is not possible, smaller isolated systems will continue to construct isolated high-cost generation facilities in order to meet increasing loads. Often these facilities will not be able to take advantage of the economies of scale of larger units and may have an adverse impact on the surrounding environment.

## III

## SMALL UTILITIES DO CONTRIBUTE SUBSTANTIAL BENEFITS TO LARGE UTILITIES [6]

We turn now to instances where large systems have benefited from interconnection with smaller systems. These examples do not constitute an exhaustive list but only represent the various types of assistance small systems are capable of rendering when interconnected to larger systems.

Kansas Power and Light Co. (generation capacity 842,000 kw) is interconnected with the Board of Public Utilities, McPherson, Kansas, generation capacity 51,000 kw). During the summer of 1969 Kansas Power and Light sold to McPherson 5,056,000 kwh but purchased over 15,200,000 kwh to help meet its loads.

Holyoke Gas and Electric Department, Massachusetts, (generation capacity 42,000 kw) is interconnected with the Connecticut Valley Electric Exchange ("Convex") which has generation resources in excess 3,000,000 kw. Holyoke's 10,000 kw gas turbine generator, which was expected to be run only 300 hours per year when installed for local emergency and peaking power, was called upon by the "Convex" central dispatching agency for a total of 860 hours in 1969 to help meet area-wide loads.

Northern States Power Company, Minnesota, is interconnected with several local publicly owned power systems, many of which have generating capacities of

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[6] Statistics on generating capacity derived from *Public Power, Directory Issue,* American Public Power Association, January 1970, and *Electrical World Directory of Electric Utilities,* McGraw-Hill, New York, 1969 and 1970. Statistics on power sales are based upon reports from individual utilities.

less than 2,000 kw. After a failure at its Allan S. King plant in June 1970, Northern States called upon these small systems to supply it with as much power as possible to meet loads. This assistance has continued intermittently through the summer and contributed to averting a widespread power shortage.

Paris, Kentucky, (generation capacity of less than 5,000 kw) is interconnected with Kentucky Utilities Company (generation capacity 705,000 kw). In the summer of 1969 Paris was required to operate its plant to assist Kentucky Utilities in meeting peak loads. The same assistance is expected to be rendered again this year.

Northwestern Iowa Power Cooperative ("NIPCO"), a large utility system, lost a major interconnection at Sioux City on July 17, 1970, and asked all municipal systems in Iowa with which it was interconnected to turn on their generators. These generators are considered only as standby energy sources, and as a result of their ability to deliver power to "NIPCO," service was maintained without interruption.

While the examples cited above represent only a few of the instances where small utility systems are able, through interconnection, to assist very large systems in meeting loads beyond the capacity of any individual system, they do point out the essential feature of strong interconnections. All parties assist each other. Benefits accrue no matter how large or small a particular system may be. They are neither insignificant nor "illusory" as the court below would have it.

## IV

### THE DECISION BELOW DEPRIVES THE FPC OF ITS AUTHORITY TO DETERMINE THE TERMS AND THE CONDITIONS OF INTERCONNECTION

Congress enacted Parts II and III of the Federal Power Act as part of the public holding company legislation of 1935 (49 Stat. 487; 16 U.S.C. 824-824(h), 825-825(r)). This legislation constituted a comprehensive effort to bring the electric power industry under effective federal regulatory control. Among other things, Congress recognized that the goal of an abundant supply of electric energy is attainable only through proper utilization and conservation of the nation's natural resources and that extensive interconnection and coordination of facilities for the generation, transmission and sale of electric energy is required to achieve this goal. Thus, it enacted Section 202(b) of the Federal Power Act (16 U.S.C. 824a(b)), which provides:

> "Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided,* That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. *The Commission may prescribe the terms*

*and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them."* (Emphasis added.)

The principles of administrative law are settled that language, such as that contained in Section 202(b), places an obligation on the Federal Power Commission to exercise its expertise and judgment to determine the terms and the conditions of any interconnection it may order. (*Board of Trade of Kansas City* v. *United States,* 314 U.S. 534, 546-48 (1942).) Moreover, courts, in reviewing administrative decisions which establish rates, are limited in their review, and an administrative body must be accorded latitude to exercise its power and discretion to reconcile diverse and conflicting interests. (*Permian Basin Area Rate Cases,* 390 U.S. 747, 767 (1968); *FPC* v. *Natural Gas Pipeline Co.,* 315 U.S. 575, 585 (1942).)

In this case, the Commission, in denying Florida Power's request that Gainesville be assessed a standby demand charge for emergency reserves, whether used or not, specifically found that the benefits from interconnection would accrue not only to Gainesville but also to Florida Power. On page 13 of the Commission's opinion, it stated, "The evidence before us shows that Gainesville will be contributing its proportionate share of instantaneous emergency service and installed generating capacity, including reserve capacity."

The Commission determined that the correct method of allocating the costs of interconnection was on the basis of the *responsibilities* borne by the parties:

"As we have explained, that sharing must be based upon, and follow, the proportionate burdens each

> system places upon the interconnected system networks, not the benefits each expects to receive." (p. 12)

Yet the court below dismissed the notion that Florida Power would benefit from the interconnection. It called the benefits specifically identified by the Commission "largely illusory" (p. 16) and concluded:

> "The Commission's policy of proportionate utility responsibility really works only one way. The small system receives high benefits and, because of its size, no real obligations. The large system, however, receives no benefit but does incur real, substantial responsibilities. Such imaginary equity is not reasonable compensation." (p. 17)

The court below disregarded the careful examination the Commission made of the results expected from interconnection and seized upon a "gross size" test for determining whether both a large and small utility would benefit from interconnection. This "gross size" test consists only of an overall measurement of the power capabilities of the two systems seeking interconnection. If one is substantially larger than the other, the court would summarily conclude *ipso facto* that only the smaller system will benefit from interconnection, and hence the smaller must pay additional fees to the larger system in addition to paying its share of the allocated costs of the interconnection. However, as can be seen from the examples cited above, benefits do *not* run only from large to small utilities. Small systems play an important role in providing electrical service to customers of large systems when they are interconnected.

Beyond the merits of the test adopted by the court below, its ruling results in a serious limitation of the Commission's duty to utilize its expertise and exercise

its judgment in the field of electric energy and forces the Commission to abrogate its responsibility as a regulatory agency. Henceforth, small electric utilities involved in Section 202(b) proceedings can only expect the Commission to compare their total generating capacity with that of a larger system. Upon finding a significant disparity, the FPC will be obliged to determine that the small utility can in no way benefit the large utility or its customers and therefore direct that it must pay tribute to the larger system for interconnection beyond the smaller utility's contribution of its share of the costs of interconnection and energy used. The Commission would have little if any latitude to investigate the facts of interconnection in any particular case.

## CONCLUSION

The impact of this decision on the negotiations and plans for interconnection among utilities across the nation will be substantial. The broad policy announced by the court below regarding the authority of the Federal Power Commission to establish the terms and conditions for interconnection and those terms and conditions set by the court in this instance raise important questions of federal law which must be settled by this Court. Therefore, the petition for writ of certiorari of petitioner Gainesville in this case should be granted.

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